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# Living the American Dream: A Review of John Hart Ely's *On Constitutional Ground*

John D. Feerick

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## BOOK REVIEWS

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### LIVING THE AMERICAN DREAM: A REVIEW OF JOHN HART ELY'S *ON* *CONSTITUTIONAL GROUND*

*John D. Feerick\**

I was privileged to be asked by the editors of the *Notre Dame Law Review* to review Professor John Hart Ely's book, *On Constitutional Ground*.<sup>1</sup> I was surprised by the invitation, however, since I have not been actively engaged in the discussions of the academy on the role of the Supreme Court, or more precisely, what theory of constitutional interpretation should be used by the Court in discharging its reviewing function. I confess that I initially thought the invitation was intended for one of the several constitutional law theorists on my school's faculty. When I realized that I did not have an "out" on this ground, I concluded that I had little choice but to take on the challenge of reviewing this book by one of the formidable constitutional theorists of this century. If anything, I wanted to prove to myself that Professor Ely's observation about law school deans is wrong (I'm not sure I succeeded!): "As they approach middle age, law professors tend to deny their dwindling creativity by becoming deans . . . or some other form of jackanapes."<sup>2</sup>

Having read the book twice, and certain parts more than that, I am glad I had the opportunity to do this review, even if it did ruin my summer, so to speak. I put it this way because I quickly became absorbed in the subjects treated in the book and was tempted to reach out for the other writings of the author referred to throughout the

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\* I acknowledge the special assistance I received from Griffin Reidy, a student at Fordham Law School, with respect to the 1996/97 term of the Supreme Court; and other assistance from my colleagues, Robert Cooper, Esq., Michele Falkow, Esq., and Mr. Gregory Blackman.

1 JOHN HART ELY, *ON CONSTITUTIONAL GROUND* (1996) [hereinafter *GROUND*].

2 *Id.* at 474 n.10.

book. I particularly recommend this book for anyone who has an interest in becoming more engaged in the tantalizing constitutional and non-constitutional issues of our day, and certainly for anyone who follows or would like to know more about John Hart Ely. The book is an especially good introduction for anyone seeking to be brought up to date on issues of constitutional law. It is masterful in accomplishing that purpose. I need to caution, however, that the book is not easy to read or, for that matter, to review because it deals with an extraordinary number of subjects; indeed, it almost runs the gamut of an entire law school curriculum.

Consider the subjects treated in the book's carefully written and meticulously footnoted 507 pages: federalism, separation of powers, freedom of expression, religious freedom, criminal procedure, racial discrimination, substantive due process, candor, and many other subjects within each of these broad categories. More specifically, the author touches on such interesting subjects as President Clinton's use—inappropriate as he sees it—of the Constitution to abolish the military's ban on gays and the President's exercise of military force in Bosnia, Haiti, and Somalia; whether a President can be indicted prior to being impeached; the importance of the "reasonable doubt standard" despite the "unsettling outcome" of the O.J. Simpson trial in Los Angeles; the high standards that should apply to educational institutions in the conduct of student discipline; the shortcomings of the English Rule against contempt of court limiting what the media can publish concerning the administration of justice; the French system of investigating crimes; the incompleteness of certain aspects of the Warren Commission Report because of its dependence on the government's then existing investigative agencies; the use of lies to gain career advancement, with particular comments on Justice Clarence Thomas and Professor Anita Hill; and the "futility" of believing that Supreme Court nominees can be judged "on anything other than their politics."

I found especially well done Professor Ely's treatment of the Constitution's bill of attainder provision<sup>3</sup> and his analysis of the Supreme Court's decision in *United States v. Lovett*,<sup>4</sup> which struck down a con-

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3 U.S. CONST. art. I, § 10.

4 328 U.S. 303 (1946). His fascination for the bill of attainder appears to have developed in law school and then reached its pinnacle when he clerked for Chief Justice Warren. As a clerk, he contributed to the Court's decision in *United States v. Brown*, 381 U.S. 437 (1965), which invalidated a congressional statute based on the bill of attainder provision. See Professor Ely's treatment of the subject in Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962).

gressional statute prohibiting federal money from being used to pay the salary of three individuals named in the law. I recommend for every trial advocacy teacher, as well as other members of the academic community, his incisive step-by-step critique of the case strategy and development of *United States v. Lovett*. I also found splendid his chapters on freedom of expression and religious freedom and his treatment of reverse discrimination and affirmative action.<sup>5</sup> There is much in these chapters for contemporary America, though the material included was actually written in the context of the 1960s and 1970s.

I must admit, however, to having had difficulty working through parts of the chapter on federalism dealing with the "irrepressible" *Erie Railroad v. Tompkins*<sup>6</sup> and choice-of-law theorizing.<sup>7</sup> Interestingly, he anticipated that possibility by noting his own difficulty in finding enforceable principles of federalism. But he is not ambiguous about where he is going because he expresses a strong preference for leaving more subjects to state regulation and for the Supreme Court "keeping the federal government from attaining plenary legislative power."<sup>8</sup> I found his views on criminal procedure to be powerfully presented with respect to the exclusionary rule and the need to reconsider the decision in *Harris v. New York*,<sup>9</sup> which allowed incriminatory statements made without a lawyer to be admitted into evidence. His sensitivities to the rights of criminal defendants are manifested throughout the book. He comments on the need for judges to take steps to ensure the integrity of trials in the face of prejudicial publicity, deplores the Supreme Court's cutback on post-conviction reme-

5 GROUND, *supra* note 1, at 188-97, 247-78.

6 304 U.S. 64 (1938). Professor Ely persuasively argues that when a matter is covered by a Federal Rule, the relevant reference point in determining whether state or federal law applies should be the Rules Enabling Act of 1934 and not *Erie*. His discussion of that Act and various Supreme Court cases (including *Hanna v. Plumer*, 380 U.S. 460 (1965)) is quite helpful. See GROUND, *supra* note 1, at 50-61.

7 He casts a cold eye on the view that "states have a greater interest in advancing the interests of their own than they have in advancing the interests of outsiders." GROUND, *supra* note 1, at 65. He therefore rejects a choice-of-law system based on that premise and instead expresses a preference for the law of a common domicile or the joint law of the domiciles of the plaintiff and defendant. See John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

8 GROUND, *supra* note 1, at 32-33.

9 401 U.S. 222 (1971); see GROUND, *supra* note 1, at 211-30. My colleague, Professor James Kainen, joins Professor Ely in making a strong case for eliminating the impeachment exception to *Agnello v. United States*, 269 U.S. 20 (1925), finding that "the scope of exclusionary rules . . . raises meaningful normative questions about the constitutional integrity of the criminal process and not the unavoidable evidentiary costs of that integrity." James L. Kainen, *The Impeachment Exception to the Exclusionary Rule: Policies, Principles and Politics*, 44 STAN. L. REV. 1301, 1372 (1992).

dies, and urges that at the time of guilty pleas judges should make a thorough inquiry into the facts and bargains. I was touched by his defense of public defenders, with which I agree, and found poignant his search for the Bay Harbor Poolroom, the site of Gideon's alleged burglary. His latter treatment, as well as other parts of the book, suggest to me that Professor Ely has a literary talent that may one day express itself in a prize-winning novel or two—not unlike John Grisham's stories of the law.

His views on the subject of flag desecration were prescient given that they preceded by fifteen years the Supreme Court's decisions in *Texas v. Johnson*<sup>10</sup> and *United States v. Eichman*.<sup>11</sup> "Orthodoxy of thought," he declared, "can be fostered not simply by placing unusual restrictions on 'deviant' expression but also by granting unusual protection to expression that is officially acceptable."<sup>12</sup> Compare Justice Brennan's statement for the Court in *Johnson*: "We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today,"<sup>13</sup> and his statement in *Eichman*: "Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."<sup>14</sup>

Professor Ely's postscripts and commentaries throughout the book are worth the purchase price. In addition, the book contains a number of interesting anecdotes which I have not seen elsewhere. For example, he mentions a time when he recommended a female law clerk to Chief Justice Warren, a recommendation to which the Chief listened with restraint and then "noted (among other things) that he worked very closely with his clerks and wondered what this might put her (and others) in a position to accuse him of."<sup>15</sup> Ever apologetic for the Chief, whom he greatly admired, Professor Ely adds, "[H]e was seventy-three years old and thus no one would listen to charges of sexual impropriety anyhow . . ."<sup>16</sup> He also records an encounter with Justice Tom Clark concerning the subject of bills of attainder. Justice Clark, who dissented in *United States v. Brown*,<sup>17</sup> said to him while the case was pending: "A bill of attainder! What on *earth* is a bill of attain-

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10 491 U.S. 397 (1989).

11 496 U.S. 310 (1990).

12 GROUND, *supra* note 1, at 186.

13 *Johnson*, 491 U.S. at 419.

14 *Eichman*, 496 U.S. at 319.

15 GROUND, *supra* note 1, at 335.

16 *Id.*

17 381 U.S. 437 (1965).

der?"<sup>18</sup> Professor Ely responded that he ought to know since he had written many opinions rejecting bill of attainder claims, to which Justice Clark responded, "Yes, but remember what my opinions said: 'It is also argued that this is a bill of attainder. It is not.'"<sup>19</sup>

Professor Ely also shows in the course of the book that there are limits to a law clerk's persuasive powers when it comes to a Supreme Court Justice. This is illustrated by an excerpt from a memorandum he wrote to Chief Justice Warren concerning *United States v. Seeger*, which was decided on a theory Professor Ely "derided" in the memorandum.<sup>20</sup> Also included is a memorandum he sent to Chief Justice Warren concerning *Griswold v. Connecticut*, urging that the law in question not be invalidated on the basis of a violation of a general right of privacy.<sup>21</sup> He notes that the Chief Justice "didn't buy a word" of his advice and "went along with the Court's right to privacy line."<sup>22</sup>

A philosophical and humanist strand runs throughout the book, much of which resonated with my own sense of life. Thus, in the section on lying to gain career advancement, he quotes from a letter he sent to *The New York Times* in 1988: "Why can't we have a world in which accurate pictures of people are permissible, but making mistakes is too?"<sup>23</sup> With respect to complaints that "nothing can work" and that "no successful theory is possible," he observes:

The message . . . will be that courts needn't hang themselves up on niceties like principled decision-making. Perhaps the new realists find reassurance in that sea of idealistic young faces peering back over the student benches. I find less in a truly realistic appraisal of the ideology that is likely to issue from those faces when they've grown old enough to peer over judicial benches.<sup>24</sup>

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18 GROUND, *supra* note 1, at 414 n.176.

19 *Id.*

20 380 U.S. 163 (1965). The case involved a provision of a federal statute which excused training and service for a person "by reason of religious training and belief" who was conscientiously opposed to participation in war. In the excerpt contained in the book, Professor Ely urged that the Court not attempt to review the facts or define religion, God, and Supreme Being. GROUND, *supra* note 1, at 188-89. He felt that the law should have been invalidated because of a violation of the principle of neutrality by favoring a particular religion over another religion or religion over non-religion. *See id.*

21 381 U.S. 479 (1965). The case involved the constitutionality of a Connecticut statute which proscribed the sale and use of drugs and medical instruments for birth control purposes, as well as advice by physicians concerning birth control. The Court, in finding the statute unconstitutional, grounded its decision on the Fourteenth Amendment and the existence of a marital right of privacy.

22 GROUND, *supra* note 1, at 281.

23 *Id.* at 338.

24 *Id.* at 364-65.

And as for those of us who are their teachers, what could possibly be the joy in a life devoted to reiterating that nothing will work?

The format of the book is rather unique. It moves forward immediately without the usual preface and foreword or hint as to what is to come, except as divined from the Table of Contents. What unfolds are excerpts from a published book, articles, speeches, and other writings of the author, as well as excerpts from papers and memoranda he wrote in law school and as a law clerk and government official, unpublished until now. He also includes published and unpublished letters, congressional testimony of his, and a fan letter he sent to several members of the Supreme Court commenting on the Court's decision in *Planned Parenthood v. Casey*.<sup>25</sup> The book is exceptionally rich with the author's perspectives and insights. It reflects an extraordinary mind, a superb writer, a deep thinker, a seeker of what is right and just, and a person with a very good sense of humor and a wonderful compassion for the underdog and disadvantaged. In a very real sense the book is John Hart Ely's autobiography of the past almost forty years of his professional life. It has a "swan song" quality to it, though I know he is far from that, given his age (younger than I!), mind, heart, and present commitments.

I suspect that each of us has a book like this within our dreams simply as a way of recording, modestly if that is possible, what we are most proud of in our life. In the case of John Hart Ely, he has lived, in Holmes's expression, greatly in the law and responded "philosophically" and "self-sacrificing enough" to Holmes's call for a treatment of subjects that unifies "the entire body of law."<sup>26</sup> He has enjoyed a remarkable career: as a summer associate with Abe Fortas and the opportunity to help develop the strategy and brief in *Gideon v. Wainwright*;<sup>27</sup> service as a military policeman upon his graduation from Yale Law School in 1963; a position on the staff of the Warren Commission that investigated the assassination of President John F. Kennedy; a clerkship with Chief Justice Earl Warren during the 1964-65 term; a year as a Fulbright Scholar at the London School of Eco-

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25 505 U.S. 833 (1992). Although opposed to the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), he applauds the *Casey* Court for standing by that decision lest it "weaken the Court's authority immeasurably." See GROUND, *supra* note 1, at 305.

26 Book Notice, 5 AM. L. REV. 340, 341 (1871) (reviewing C.G. ADDISON, *THE LAW OF TORTS* (1870)).

27 372 U.S. 335 (1963). In that case, the Court gave expression to the rule that persons accused of crimes are entitled to counsel in both capital and non-capital cases. A most thoughtful memorandum of that experience is quoted from in the book. GROUND, *supra* note 1, at 198-203. It is a stellar example for today's law students of legal analysis, writing, and advocacy.

nomics; and several years as a public defender and co-founder of San Diego Defenders, Inc. In 1968 he launched his career in academia as an associate professor at Yale Law School. This was followed by a professorship at Harvard Law School in 1973, a brief period of service as general counsel of the United States Department of Transportation, a return to Harvard as the Ralph S. Tyler Jr. Professor of Constitutional Law, and then selection as dean and Richard E. Lang Professor at Stanford Law School in 1982. Since 1996, he has occupied the Richard A. Hausler Professorship at the University of Miami Law School.

John Hart Ely's influence and writings have been profound and monumental. There can be no question that he contributed greatly to the Supreme Court's decisions in *Gideon v. Wainwright*<sup>28</sup> and *United States v. Brown*,<sup>29</sup> gave exemplary public service in San Diego and for the United States Department of Transportation, and helped shape the debate on constitutional theory since his 1980 book, *Democracy and Distrust: A Theory of Judicial Review*.<sup>30</sup> His writings before and after this landmark work may not have been acclaimed to the same extent, but are significant and important benchmarks of their own, particularly when addressing the use of motivation in constitutional interpretation,<sup>31</sup> substantive due process against the backdrop of *Roe v. Wade*,<sup>32</sup> and the war-making powers of the Constitution.<sup>33</sup> Whatever one's point of view on the Constitution might be, Professor Ely has been in the forefront trying to find and articulate the proper role of the Supreme Court vis-a-vis other parts of government. He has led, educated, challenged, and provoked, earning for himself a special place in the American legal profession.<sup>34</sup>

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28 372 U.S. 335 (1963).

29 381 U.S. 437 (1965).

30 JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

31 See his seminal article, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L. J. 1205 (1970).

32 410 U.S. 113 (1973); see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

33 The author develops these themes fully in his book, JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993). My colleague, Professor William Michael Treanor, draws on this book for his article, William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997). While agreeing with Ely's pro-Congress reading of the war-making power, Professor Treanor adds much to the discussion by developing the proposition that "the Founders gave Congress the power to start war because they believed that Presidents, out of a desire for personal glory, would be too prone to war." *Id.* at 772.

34 For one example of his influence on a new generation of academics, see the articles by Professor Treanor on the Takings Clause of the Constitution, in which he urges greater deference to the legislative process, with special protections for discrete



Because it is not possible in the limited scope of a review to cover all of the ground contained in this enormous book, I will content myself to offer comments on only a few of the subjects, including as I go references to perspectives of some of my colleagues on the Fordham Law faculty. Finally, I will end by testing how well the views of John Hart Ely have stood up in the most recent term of the United States Supreme Court, recognizing, as Ely does, that there is an ebb and flow in the history of the Court and in the nation of which it is a central part. As Professor Ely notes, even if one's views fail to gain acceptance, the effort to do so "is enough to fill a person's heart."<sup>35</sup>

### I. ELY'S GENERAL THEORY

Professor Ely suggests that the role of courts is to protect rights that are "designated with some specificity in a constitutional document," to protect rights of political access with respect to open-ended provisions of the Constitution such as the Ninth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment, and to ensure that the rights of minorities are "not to be treated by a set of rules different from that which the majority has prescribed for itself."<sup>36</sup> His emphasis is on access rights and equality rights, eschewing a role for the Court in protecting "society's fundamental values" or identifying constitutionally "unstated fundamental principles of substantive justice."<sup>37</sup> He confesses scepticism that a small group, such as the members of the Supreme Court, have the right answers to questions of public policy, or better answers than those that emerge in our legislative bodies. While acknowledging that the deliberations of legislative bodies are far from perfect, he believes that "nonetheless our democratic system is one that is in various ways programmed, at least roughly, to register intensities of preference."<sup>38</sup> Courts, he urges, should protect the opportunity of citizens "to participate in politics and political decisions" by leaving the product of their decisions alone. In doing so, he suggests, courts "enhance[ ] the autonomy" of citizens and put them in a position where they can "behave morally."<sup>39</sup> He thus says to courts:

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and insular minorities. William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

35 GROUND, *supra* note 1, at 365.

36 *Id.* at 7.

37 *Id.* at 8, 24.

38 *Id.* at 14.

39 *Id.* at 9.

Enforce those rights that have inspired sufficient popular consensus to secure a place in the document. Enforce those rights that are needed to let us all freely and equally register our preferences. Enforce for minorities those rights that the majority has seen fit to guarantee for itself. Enforce all those rights with all the vigor you can muster. But beyond that, you simply have no right in a democracy—no more than philosophers or law professors or anyone else has—to tell the rest of us that we have made a mistake and that you know better.<sup>40</sup>

Ely's representation-reinforcing approach or process-perfecting theory has provoked enormous commentary over the past almost two decades. This commentary is admirably captured in *Symposium on Democracy and Distrust: Ten Years Later*<sup>41</sup> and in my colleague Professor James E. Fleming's thoughtful article, *Constructing the Substantive Constitution*.<sup>42</sup> As noted there, critics have charged Professor Ely with a flight from substance.

Fleming takes issue with some of the criticism, arguing that Ely does not flee from substantive political theory because his is "a process-perfecting theory that perfects processes in virtue of its substantive basis in a political theory of representative democracy."<sup>43</sup> Fleming, however, does agree with the criticism that Professor Ely fails to give effect to certain substantive constitutional provisions and lays out an elaborate analysis of constitutional constructivism of his own that he claims represents a constitution-perfecting theory. Of this analysis, Ely notes:

James Fleming is surely right in noting that the syntax of the Privileges or Immunities Clause and the Ninth Amendment is most naturally that of substantive entitlement. In the end I don't think this observation fatal—it does no violence to these provisions to read them . . . as protecting rights of participation in the processes and outputs of representative government—but at least in combination with the libertarian instincts many of us share it makes the effort seem worth a try.<sup>44</sup>

There is so much in this book which I find appealing. I am attached to John Ely's theory that we should defer more to our legislative bodies and discourage courts from inferring rights and values

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40 *Id.* at 16.

41 *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991).

42 James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993) [hereinafter Fleming, *Constructing the Substantive Constitution*]; see also James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1 (1995).

43 Fleming, *Constructing the Substantive Constitution*, *supra* note 42, at 219.

44 GROUND, *supra* note 1, at 307.

where there are no clear benchmarks. And yet, I worry about such an approach because our political world is dominated by money and powerful special interests, and many questions important to the well-being and functioning of our democracy reach the Supreme Court. The case of *Brown v. Board of Education*<sup>45</sup> is just one such example. Having had the privilege of chairing a commission with a mission of exploring government integrity in my own state, I was astonished by how entrenched the status quo is and by how resistant government is to raising its own ethical standards in areas involving conflicts of interest regulation, campaign finance reform, ballot access laws, open meetings, patronage prohibitions, whistle blower protections, procurement reform, and so on.<sup>46</sup> The impact of money on our federal system is well-documented in the daily press concerning campaign fund raising practices of both political parties in the last presidential election. Former Secretary of State Elihu Root observed a long time ago that the reason for campaign finance reform is to prevent the great aggregations of wealth from electing members of our legislative bodies "in order to vote for the protections and advancement of their interests as against those of the public."<sup>47</sup> In the face of money in politics, is it really safe to remove the Supreme Court as the final interpreter with respect to the open-ended provisions of the Constitution, especially if we agree that they have substantive content? As Ely himself notes, the reflection of intensities of preferences in legislative bodies "is certainly far from perfect, money being the most obvious distorting element,"<sup>48</sup> leading him to question *Buckley v. Valeo*<sup>49</sup> and related decisions of the Supreme Court.

It is noteworthy that Ely expresses strong concern about the functioning of the legislative process in his treatment of the bill of attainder provision and war-making power, and elsewhere in the book. Indeed, in his concluding chapter he suggests that Congress has ceased being an effective policymaking alternative to the President. "Given Congress's vanishing act," he concludes, "perhaps it is a good thing that . . . the Supreme Court . . . [is] being urged . . . to drop the pretense that they shouldn't behave like legislators. . . . Might what's happening . . . [be] our best contemporary hope of approximating

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45 347 U.S. 483 (1954).

46 See John D. Feerick, *Introduction* to GOVERNMENT ETHICS REFORM FOR THE 1990'S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 1 (Bruce A. Green ed., 1991).

47 New York State Comm'n on Gov't Integrity, *Restoring the Public Trust: A Blueprint for Government Integrity*, 18 FORDHAM URB. L. J. 173, 173 (1990).

48 GROUND, *supra* note 1, at 13-14.

49 424 U.S. 1 (1976).

the sort of balanced system the framers envisioned?"<sup>50</sup> Interestingly, Professor Ely's argument for a more limited role for the Court in dealing with open-ended provisions of the Constitution contrasts with the broad view he would have the Court take of general expressions in the specific subject matter provisions of the Constitution involving bills of attainder, the freedoms of expression and religion, and in areas involving the rights of the criminally accused.

In a world of partisan politics and a clash of conflicting interests, a case can be made that the judicially created (perhaps even the work of a law clerk!) *Caroline Products* footnote,<sup>51</sup> which has so heavily influenced the thinking of Ely, should not be seen as the full compass of the Supreme Court's role in judicial review. Thus, an important interest is served by the debate based on interpretivism, originalism, protecting fundamental rights, and reinforcing representative democracy.<sup>52</sup> I have little to add to the ongoing dialogue except to note the reflections with which I left college in 1958 as a result of my "study" of the Constitution as an undergraduate political science major. I was taught that *Marbury v. Madison* stood for the proposition

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50 GROUND, *supra* note 1, at 354 (citations omitted). The importance of "balance" in constructing a theory of the Constitution was ably articulated by my colleague, Professor Martin S. Flaherty, in Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

51 In *United States v. Caroline Products Co.*, 304 U.S. 144 (1938), Justice Stone set up the following framework for a more rigorous judicial review of legislative action:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at a particular religious or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* at 152 n.4 (citations omitted). See the criticism of an approach based on "discrete and insular minorities" voiced by a dissenting Justice Rehnquist in *Sugarman v. Dougall*, 413 U.S. 634, 656-57 (1973) (Rehnquist, J. dissenting).

52 See generally Symposium, *Fidelity in Constitutional Theory: Editor's Forward*, 65 FORDHAM L. REV. 1247 (1997).

that it was the duty of the Court "to say what the law is,"<sup>53</sup> that *McCulloch v. Maryland*<sup>54</sup> made clear the importance of the Court's reviewing function in terms of civil peace, and that the Constitution was a "living, evolving" charter, as evidenced by its history since 1789. Indeed, I even find a hint of the latter in Professor Ely's discussion of the freedom of expression, where, in speaking of the reviewing function of appellate judges, he states:

I hope we have left far behind the notion that 'The Law' is a list of rules deduced in vacuo from some set of celestial principles to which the courts have access, and therefore the bringing to bear of empirical data, and arguments as to what practical effects the adoption of a given rule would have, are somehow out of order. . . . Law that does not respond to social needs cannot, nor should it, long remain law.<sup>55</sup>

Maybe, in the final analysis, the least dangerous branch of government offers the best hope of securing our rights and liberties. On the other hand, Ely is surely right to insist that in construing the Constitution, the Court should speak with clarity in its pronouncements and prod our legislative bodies to do their job in dealing with the great moral issues of the day.

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53 5 U.S. (1 Cranch) 137 (1803). Marshall's opinion for the Court noted the specialness and primacy of a written constitution, requiring courts to apply, expound, and interpret it as "the very essence of judicial duty." He added:

Could it be the intention of those who gave this power, to say that in using it, the constitution should not be looked into? . . . This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

*Id.* at 179.

54 17 U.S. (4 Wheat.) 315 (1819). There Marshall opined about the meaning of a written Constitution and added:

Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding.

*Id.* at 407.

55 GROUND, *supra* note 1, at 159.

## II. INDICTABILITY OF THE PRESIDENT

Among the many interesting documents contained in the book is a letter, which Professor Ely did not send to *The New York Times* in 1973, taking issue with a brief filed by Solicitor General Robert Bork which argued that the President "could not be indicted prior to being impeached."<sup>56</sup> As I vividly recall, those were difficult days, and the prospect of President Nixon being impeached or indicted was very much in the air. It seemed to me at the time that there was a stampede going on that possibly was overlooking the fact that the President had his rights.<sup>57</sup> Hence, I am not sure that General Bork's reference was wholly out of line and without historical support. It bears noting that the framers of the Constitution rejected the idea of the judiciary trying cases of impeachment. Gouverneur Morris said in the Constitutional Convention debates of September 4, 1787, that "[a] conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment."<sup>58</sup> In the state ratifying debates, James Iredell said that impeachment was designed "to bring great offenders to punishment" and noted that an official who is impeached might be liable for common law punishment if the offense "be punishable by that law."<sup>59</sup> Moreover, Article I, Section 3 of the Constitution states that the judgment on impeachment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States: but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law."

To be sure, what is impeachable conduct and therefore within the zone of these provisions is far from clear.<sup>60</sup> What is clear, I suggest, is that non-indictable conduct which is not connected with the exercise of official power is beyond the scope of the impeachment power. Immunity for the President in connection with such conduct, as Professor Ely remarks, finds no support in the debates of the Constitutional Convention.

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56 *Id.* at 140-41.

57 See the reviewer's articles, John D. Feerick, *President's 'Right' in Impeachment Probe*, N.Y. L.J., April 1, 1974, at 1, and John D. Feerick, *The Hastings Impeachment Acquittal*, N.Y. L.J., May 28, 1974, at 1.

58 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., rev. ed. Yale Univ. Press 1937)

59 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113-14 (2d ed. 1941)

60 See John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1 (1970).

### III. CAMPUS DISCIPLINARY RULES

I thank Professor Ely for including in his book a letter which he sent to the Stanford Campus Report in 1991 and a memorandum he sent to members of Yale University in 1971 bearing on the subject of student disciplinary investigations and proceedings. He reflects in these writings great sensitivity to the rights and concerns of students, correctly noting that disciplinary proceedings "sometimes . . . can shape the entire course of a person's life."<sup>61</sup> It has long seemed to me that not enough attention is paid to this subject within our educational institutions from the standpoint of what is the right balance between the rights of students and the needs of a community to assure integrity. I worry at times that institutions may ignore their own responsibilities and procedures in the process of finding and pinning guilt on an accused student and fail to take advantage of the opportunity to treat an issue from an educational or pedagogical perspective. It is deplorable, in my opinion, for an institution to accuse a student and then to rush the student into a poorly crafted disciplinary proceeding without any meaningful assistance. A student thus chastized will face extreme difficulty in gaining access to postgraduate school, the professions, and government employment. Professor Ely renders an important service by reminding us that the Bill of Rights needs to have a life within our academic institutions.

### IV. THE 1996/1997 SUPREME COURT TERM

Near the very end of the book, Professor Ely observes: "If the test of success is whether one's theories will gain general acceptance over time . . . then of course the odds are almost certain that each of us will fail." He adds and concludes: "Perhaps we never will get the boulder to the top of the mountain. But the struggle itself is enough to fill a person's heart."<sup>62</sup> John Ely must, indeed, be pleased by the recent term of the Supreme Court, because his points of view in a number of areas were reflected in decisions of the Court.<sup>63</sup> Most conspicuous

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61 GROUND, *supra* note 1, at 232.

62 GROUND, *supra* note 1, at 363-65.

63 See, for example, *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), in which the Court affirmed a decision declining to accept a proposed class of present and prospective claimants. It stated that Rule 23 "must be interpreted with fidelity to the Rules Enabling Act" and cautioned that rules of procedure "'shall not abridge, enlarge or modify any substantive right.'" *Id.* at 2252, 2244. In *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329 (1997), the Court invalidated provisions of a federal statute which prohibited the dissemination of sexually offensive material, emphasizing that even offensive speech is covered by the First Amendment and may not be suppressed. In *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), the Court made clear that an

among the decisions was the play given to principles of federalism and separation of powers, subjects close to his heart. Some of the more interesting cases in terms of his writings are noted below.

### A. *Substantive Due Process*

In *Washington v. Glucksberg*,<sup>64</sup> the Court held that the due process guarantee of the Fourteenth Amendment does not protect a right to assisted suicide. It acknowledged that it should be cautious in expanding substantive due process, because the concept is open-ended and there exist relatively few guideposts. It said that by declaring a right or liberty interest, it removes an issue from public debate and legislative action, running the risk of inappropriately reflecting the policy preferences of individual Court justices.<sup>65</sup> In identifying a right, said the Court, it must evaluate whether it is "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"<sup>66</sup> The Court added that although many rights protected under due process implicate these issues of personal autonomy, not all personal decisions are similarly protected because personal autonomy is not a protected right in itself.<sup>67</sup> The Court, therefore, reversed the Ninth Circuit and upheld a Washington state statute prohibiting assisted suicide. It concluded: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."<sup>68</sup> Concurring, Justice Stevens stated "that there is

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indigent parent was entitled to access to an appeal, through a transcript of relevant proceedings, in a civil case involving the loss of parental rights. In so doing, it struck down a Mississippi law which conditioned the right of appeal on prepayment of record fees in the amount of approximately \$2,400. And, in *Chandler v. Miller*, 117 S. Ct. 1295 (1997), the Court found unconstitutional under the Fourth Amendment (as incorporated into the Fourteenth) a state law which required candidates for public office to pass a drug test. The Court said that the test "diminished 'personal privacy' for a symbol's sake." *Id.* at 1305. The Court added: "Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." *Id.* at 1303.

64 117 S. Ct. 2258 (1997).

65 See *id.* at 2267–68.

66 *Id.* at 2268 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) and *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

67 See *Glucksberg*, 117 S. Ct. at 2271.

68 *Id.* at 2275.



also room for further debate about the limits that the Constitution places on the power of the States to punish the practice."<sup>69</sup>

### B. Federalism

In *Printz v. United States*,<sup>70</sup> the Court invalidated the Brady Act because it required individual state officials to regulate the sale of guns. The Court stated that federal laws imposing regulatory schemes upon states is not supported by the structure of the Constitution, history, and the Court's jurisprudence. It stated that such an imposition violates the concept of federalism and thereby erodes a significant structural protection of liberty by which the Constitution prevents an excessive accumulation of power in any one branch. The Court also said that such impositions violate the concept of separation of powers by denying the President his responsibility to supervise the faithful execution of the laws and represent a further accumulation of power by Congress unto itself, risking the road to tyranny against which the Constitution was designed to guard. Thus, while Congress can itself regulate the sale of guns via its commerce clause powers, the Court said that it cannot force a regulatory scheme upon state officials. Said Justice Scalia: "When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions[,] . . . it is not . . . 'proper for carrying into Execution the Commerce Clause,' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'"<sup>71</sup> In so finding, the Court responded to a plea contained in *On Constitutional Ground* that there should be some limits placed on the commerce power in the interest of federalism. Ely noted that "the root explanation of runaway federal power . . . is the seeming illimitability of the commerce power, for which no one has been able to define a principled cutoff, at least not one with serious teeth."<sup>72</sup>

### C. Presidential Immunity

In *Clinton v. Jones*,<sup>73</sup> the Court found that a sitting President does not have immunity from a private action for civil damages. In the course of its decision, the Court said that presidential immunity applies only to the performance of official functions and that such litiga-

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69 *Id.* at 2304.

70 117 S. Ct. 2365 (1997).

71 *Id.* at 2379 (quoting *THE FEDERALIST* NO. 33, at 204 (Alexander Hamilton)).

72 *GROUND*, *supra* note 1, at 38.

73 117 S. Ct. 1636 (1997).

tion, as vexing as it may be, does not rise to the level of a separation of powers risk.<sup>74</sup> The outcome in this highly-publicized case accords with the views expressed by Ely in a 1973 memorandum to Archibald Cox on the legality of calling President Nixon before a grand jury, to wit: "The 'convention' that the president cannot be called before a grand jury, let alone that he is generally immune to the judicial process, seems very faint indeed."<sup>75</sup> He adds in a footnote in the book with respect to the then-pending *Clinton v. Jones* lawsuit: "We've come far enough toward the sort of regal presidency the framers abhorred without effectively immunizing behavior of the sort alleged . . . ."<sup>76</sup>

#### D. Religious Freedom

Three cases involving the religion clauses of the Constitution are noteworthy because of the element of federalism expressed by the outcomes in the cases. In *City of Boerne v. Flores*,<sup>77</sup> the Court invalidated the Religious Freedom Restoration Act of 1993, which was passed in response to the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*.<sup>78</sup> In *Smith*, the Court upheld an Oregon statute prohibiting the use of peyote, among other narcotics, in the face of a free exercise challenge by Native Americans. In its *Boerne* decision, the Court said that it alone had the power to declare the constitutional right to free exercise of religion and that Congress does not have the power to alter the substantive meaning of the Constitution's guarantee in this area. Such power would enable legislative majorities to evade the amendment process and place legislative acts on the same level as constitutional provisions. The Court concluded that there was no need for so sweeping an act as that passed by Congress imposing such burdens upon states.

In *Timmons v. Twin Cities Area New Party*,<sup>79</sup> the Court upheld a law of Minnesota prohibiting fusion candidacies through the vehicle of multi-party nominees. Although First and Fourteenth Amendment associational rights were implicated, the Court found the burdens imposed by the state law to be of a lesser variety and not sufficient when balanced against the regulatory interests of the state. The Court stated: "States certainly have an interest in protecting the integrity,

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74 *Id.* at 1645-50.

75 GROUND, *supra* note 1, at 138.

76 *Id.* at 415 n.183.

77 117 S. Ct. 2157 (1997).

78 494 U.S. 872 (1990).

79 117 S. Ct. 1364 (1997).

fairness, and efficiency of their ballots and election processes as means for electing public officials."<sup>80</sup>

In *Agostini v. Felton*,<sup>81</sup> the Court found that providing services on parochial premises under Title I of the Elementary and Secondary Act of 1965 did not constitute an excessive entanglement with religion. The Court said that it had rejected the notion in earlier cases that a public employee on sectarian premises is presumed to inculcate religion in her work and symbolizes a union between church and state.<sup>82</sup> It noted that the public aid in question reached sectarian institutions as a result of private decisions and that the services were provided based on neutral criteria. Quite clearly, the Supreme Court has adopted the theory and language of neutrality suggested by Professor Ely with respect to its treatment of the religion clauses.<sup>83</sup>

### *E. Reverse Discrimination*

In *Abrams v. Johnson*,<sup>84</sup> the Supreme Court held that race cannot be a predominant factor in drawing district lines favorable to minorities. The Court upheld a plan formulated by the district court which contained only one majority-minority district, instead of two as preferred by the state legislature, because creating a second would have amounted to subordinating the state's traditional districting policies and considering race predominately. Given his thoughtful treatment of the subject of reverse discrimination, Professor Ely would not have been surprised by the outcome in this case, although he has suggested a different approach in reviewing racial classifications that advantage minorities:

When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A white majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of whites relative to those of others, or to overestimate the costs of devising an

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80 *Id.* at 1373.

81 117 S. Ct. 1997 (1997).

82 *See id.* at 2010.

83 In *On Constitutional Ground*, Professor Ely notes that "[t]here is no constitutional bar to helping or hindering religious persons or groups along with otherwise similarly situated persons or groups. Deviation from neutrality occurs only when religion or a religion is singled out for advancement or inhibition." *GROUND*, *supra* note 1, at 195.

84 117 S. Ct. 1925 (1997).

alternative classification that would extend to certain whites the advantages generally extended to blacks.<sup>85</sup>

In contrast to what the Court did in *Abrams*, Ely has observed: "Measures that favor racial minorities pose a difficult moral question that should, by one method or the other, be left to the states. There is nothing suspicious about a majority's discriminating against itself, though we must never relent in our vigilance lest something masquerading as that should in fact be something else."<sup>86</sup>

In the coming term of the Supreme Court<sup>87</sup> the issue of affirmative action will present itself, and Professor Ely's views on that subject will have an important test. On this subject, he has written: "[I]f we are to have any hope of defeating racial prejudice we will, at least for a time, have to take race into account for some purposes"; and:

[T]he question is whether the negative educative effects of using racial criteria to overcome centuries of discrimination are so inevitable, and so threatening, as to outweigh the good that such programs may accomplish. It is a difficult question, but the basis for an affirmative answer can hardly be secure enough to support an absolute declaration of constitutional impermissibility.<sup>88</sup>

## V. CONCLUSION

I am grateful for the opportunity to review this book. It has renewed my passion for constitutional law and for delving into constitutional theory. But more than that it has made me appreciate more fully one of America's greatest constitutionalists and an outstanding member of the legal profession. John Hart Ely can be rightly proud of the role he has played as a lawyer and teacher and of his own contributions to making "the American Dream more broadly accessible than it had ever been before."<sup>89</sup> I applaud him for this volume and wish him continued heavy lifting in the law. I know that there are many issues of contemporary interest on which he has not yet published a view. Given the esteem in which he is held by all who know him and

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85 GROUND, *supra* note 1, at 272.

86 GROUND, *supra* note 1, at 275; see also James Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). For a most thoughtful treatment of increasing the representation of minorities in the Senate, see the article by my colleague, Professor Terry Smith, *Rediscovering the Sovereignty of the People: The Case for Senate Districts*, 75 N.C. L. REV. 1 (1996).

87 *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996), cert. granted, 65 U.S.L.W. 3354, 3849, 3860 (U.S. June 27, 1997) (No. 96-679).

88 GROUND, *supra* note 1, at 273, 274.

89 *Id.* (speaking of Chief Justice Earl Warren).

by others like me from afar, I await with interest his future writings, in whatever form.

## FREEDOM IS A THEME ONLY

*Stephen J. Safranek\**

*The Theme is Freedom* is M. Stanton Evans' recent attempt to "set straight accepted" but "mistaken notions about our country, its institutions, and its freedoms."<sup>1</sup> Evans wants to show how freedom was developed in this country—based upon the principles developed throughout history. This is the task Evans sets for himself, and the book successfully accomplishes this task. *The Theme is Freedom* is replete with interesting historical information and a useful critique of many current views of how the people of the United States have been made free. Although Evans does not clearly set forth the means by which he will accomplish his task, his approach is generally straightforward. Essentially, Evans sets forth the historical development of freedom as it relates to the United States and our peculiar institutions. This approach begins with a discussion of what freedom means and how the idea of freedom developed. Then, in what are the central chapters of the book, Evans shows how the freedoms developed in the two millennia before the founding of America led to the specific incarnation of freedom found in America. Finally, in his concluding three chapters, he discusses the way in which modern society threatens that freedom—because of its view of the establishment clause and economic freedom—and how freedom can be recovered.

Evans looks at the historical documents, draws reasonable conclusions from them, and sees the history of the development of freedom and this country in a way certain to annoy some. However, whether or not one agrees with Evans, one can read this book and have a firm understanding of why conservatives are unhappy with the way things are in the United States. In short, *The Theme is Freedom* is a useful source for a readable view of principled conservatism.

This book serves as a nice contrast to books such as George Will's *Statecraft as Soulcraft*<sup>2</sup> and Barry Goldwater's *The Conscience of a Conservative*.<sup>3</sup> Unlike such works, Evans' book is not concerned with devel-

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\* Associate Professor of Law, University of Detroit Mercy School of Law.

1 M. STANTON EVANS, *THE THEME IS FREEDOM*, at xi (1994).

2 GEORGE F. WILL, *STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES* (1983).

3 BARRY M. GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* (1975).

oping the philosophy of conservatism, although Evans does defend it. Instead, he explains historically how freedom developed in the United States. This historical review will be of interest to many because of its ease of reading.<sup>4</sup> However, this strength is also the book's weakness. Although Evans makes a good historical argument, he is on less solid ground when he tries to explain how freedom was or is being lost and how it can be rekindled. It appears that Evans thinks that religion is the key to re-founding this country and that the religion of the Old and New Testaments is the religion that can reform society. Yet, he never shows why or how this reform can happen, despite his obvious discontent with the current state of government. Is America, like England, destined to become a country where "freedom" is slowly replaced with coercion?

### I. OVERVIEW

The first chapter of this book begins with the dramatic collapse of the Soviet Union and its lesson for the United States. In "The Liberal History Lesson,"<sup>5</sup> Evans notes that the Soviet Union was the archetype of central planning—there was no limit on the power of the central government. In contrast, the tradition of the United States, the clear winner of the Cold War, "is, precisely, the idea of imposing limits on governmental power, in the interests of protecting freedom."<sup>6</sup> This is the key recurring theme in this book. For Evans, the key means by which freedom can be ensured is by limiting governmental power.

Evans recognizes that the common response to conservatism is to challenge the pairing of libertarian economics with social conservatism. He faces this issue squarely and claims that the libertarian economics he values is dependent upon religious values and traditional practice for its survival.<sup>7</sup> He thinks that one can be both an economic libertarian and a social conservative. Indeed, he argues in this book that the two thousand year tradition of Western Civilization was based upon religion and that the religion of the West played a decisive role in creating the free society founded in 1787.

Evans argues for this premise for the next three hundred pages. He recognizes that how one views the founding of this country and how one views the individual will shape one's belief as to the kind of

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4 For a much more thoughtful and complicated review of conservatism that begins with Edmund Burke, the key text is RUSSEL KIRK, *THE CONSERVATIVE MIND: FROM BURKE TO ELIOT* (7th ed. 1986).

5 EVANS, *supra* note 1, at 3-21.

6 *Id.* at 14.

7 *See id.*

country "America is, or should be."<sup>8</sup> He attempts to prove that true conservatives embrace free institutions—churches as well as businesses—and that economic liberalism arose out of the churches. It was not freeborn from the mouth of Adam Smith.

Evans chooses what he hopes is a non-controversial view of freedom, which he views quite simply as "the absence of coercion."<sup>9</sup> Such freedom, he thinks, has its genesis in Europe and is clearly focused on the individual whose liberty is "fenced off by the equal liberty of others."<sup>10</sup> Although Evans regularly uses the Puritans as a key example of the freedom that developed in America, he regularly notes that the special form of freedom found in this country was dependent upon a history of freedom that grew out of the Middle Ages as found in the writings of Augustine of Hippo and Thomas Aquinas.<sup>11</sup>

One of the first misconceptions that Evans seeks to debunk is the view that Christianity is a repressive religion and therefore is antagonistic to freedom. Among the criticisms expressed against religion is that it is superstitious, and that those who espouse a strong religious view are especially oppressive. The critics of religion cite the Enlightenment as the key historical time period for modern society that led to the growth of democracy in Europe and eventually to the founding of the United States.<sup>12</sup> Evans wants to counter this notion. He faces a difficult and uphill task, especially in today's climate where the "Religious Right" and anyone who has religious beliefs is seen as a threat to freedom. Certainly, Evans does not and cannot counter the fact that it is religious conservatives who appear to be those most interested in creating laws that will rein in what are seen as societal excesses such as teenage pregnancy, crime, abortion, and divorce. Instead of addressing this problem directly, Evans notes that the United States was born from a history of religious people. How or why religions now seek to use state power to rein in perceived excesses is not dealt with in this work.

Instead, Evans begins with the first principles of modern society that arose from the darkness of the ancient world. One of the most interesting points that he makes in his chapter titled "The Age of Despots"<sup>13</sup> is that many think that tolerance is the same as relativism, that

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8 *Id.* at 15.

9 *Id.* at 23.

10 *Id.* at 24.

11 *See id.* at 30–32; *see generally* THOMAS AQUINAS, *TREATISE ON LAW* (Gateway ed. Regnery Publishing, Inc. 1996) (1947).

12 *See* EVANS, *supra* note 1, at 39–40.

13 *Id.* at 39–56.



is, that one value is as good as another.<sup>14</sup> Unfortunately, this issue is quickly considered and summarily answered. Evans is correct in noting that relativism as a principle is like any other first principle that cannot be proven. If relativism is the key principle for free societies, which Evans thinks it is not, then slavery and every other evil are incapable of being effectively reviewed. For relativists, a society that allows or embraces slavery or any other form of barbarism is no better or worse than a society that rejects such a state of affairs. This is patently wrong. If, as is universally thought, freedom is better than slavery, we need to understand why and how this key principle came to be recognized.

Evans paints a clear picture of those societies and thinkers who have failed to recognize the value of individual freedom. In modern times, the gulag as well as the forces of Hitler's Nazis provide a clear picture of those who thought that the individual had value only in light of the state. These societies, now mostly discredited, were able to repress the individual because they were built upon a view that the state was the absolute.<sup>15</sup>

Christianity, contrary to modern views, is the key historical religion that allowed the development of the individual. As Evans notes, Christianity saw that each person is endowed with infinite value.<sup>16</sup> Precisely because of this value, no person can be seen as a mere part or cog in the state. Instead, the state is seen in relationship to the individual. Evans notes that Christian societies hold fast to absolute values of right and wrong precisely because each person is given a real and absolute value. When relativism takes hold, the necessary consequence is authoritarianism. This is because someone or something replaces each human person as an absolute value. This newfound value may be Nietzsche's "superman"<sup>17</sup> or it may be the state. But in either instance, the consequence is the repression of the individual.

The theory of natural law, which holds that each individual has a God-given value and that there are unwritten laws under which every person, even kings and princes, must act, is disregarded today. In its place are a variety of views including "natural rights." These views have generally built upon the natural law tradition, but have jettisoned certain aspects of it, usually the religion. Evans uses his chapter entitled "From Champagne to Ditch Water"<sup>18</sup> to disabuse the

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14 See *id.* at 42-43.

15 See *id.* at 50.

16 See *id.* at 309; see also MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 82 (1968).

17 See EVANS, *supra* note 1, at 53.

18 *Id.* at 57-74.

reader of the value of replacements, noting that people usually want to preserve civil liberties or some other aspect of human liberty without the baggage of natural law.

Evans critiques the "natural rights" developed by followers of Locke. Without naming them, Evans takes clear aim at the followers of Levi Strauss,<sup>19</sup> the famous political philosopher from the University of Chicago, whose followers have had a tremendous impact on the resurgent Republican party and who are often known as neo-conservatives in contrast to the paleo- or traditional conservatives. The problem with the supposed logic of a Locke or the utilitarianism of a Bentham is that the positions of these philosophers rely for their presuppositions upon what is evident to their interlocutors. What is evident are the values handed down for centuries in a religious tradition. Because of their detachment from history, the principles of a Locke or a Bentham can end in the assertion of power over the individual because both utilitarianism and the social contract presuppose moral citizens. Bentham and Locke also presuppose the idea that the people can regulate their lives.

One of the key principles of freedom is the people's ability to regulate their lives as agreed.<sup>20</sup> In one of the most startling aspects of this book, Evans asserts that we no longer have such a law, that is, a Constitution.<sup>21</sup> The reason such a change has come about is because members of Congress never ask whether or not an action is constitutional, but ask instead, whether or not it is good or bad. This same reflex has infected the judiciary. What was once a highly conservative document, Evans argues, has been made into a meaningless text. With a Constitution that grows over time and with a view of congressional power that allows laws for the general welfare, the basic division and separation of powers under law no longer can be held to exist. Today, the United States is a country whose powers are unlimited. Evans uses chapters five through fourteen to show that this result is not a natural outgrowth of what had been built. He uses his final chapters to show some of the consequences of this development.

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19 See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1970). This book provides a comprehensive outline of Strauss' views on natural rights.

20 See JOHN COURTNEY MURRAY, *WE HOLD THESE TRUTHS* 18 (1960).

21 EVANS, *supra* note 1, at 67.

## II. THE CONSERVATIVE TRADITION

### A. *The Background*

"The Uses of Tradition"<sup>22</sup> is the key chapter wherein Evans sketches the three key components of the conservative tradition of the United States. The American experience grew out of three interrelated principles: 1) limits on the power of kings; 2) the rule of law; and 3) the consensual development of the law.<sup>23</sup> These three key components of the American notion of freedom were distilled by the Founders out of the medieval and English traditions. Interestingly, Evans notes that just as the Americans were embracing these three notions, the English themselves were abandoning them.

One of the key components of the consensual English tradition was the common law.<sup>24</sup> Here Evans notes how the great legal expositor of the common law tradition, Sir Edmund Coke, had described the common law as the accumulated wisdom of many years and many persons. The value of the common law was that it provided a check upon the powers of the state. Although the common law was sometimes haphazard and intricate, these very weaknesses worked as a deterrent to those seeking to usurp the freedoms of others.

Unfortunately, Evans does not here explore how the great developer of the common law tradition, England, so easily gave itself over to the power of Parliament as the ultimate arbiter of the law.<sup>25</sup> If indeed the English tradition was the basis of our founding, why was it that the English so easily lost their way? Why is it that the current direction of the United States and England, both of which Evans would argue are not under a constitution, is not, in fact, a continuation of the tradition? Evans' attack on the problem and the concerns for unlimited power are both well taken. However, he fails to show why or how the American founding was able to avoid or overcome the problems that overcame the English common law tradition or how America, seemingly having lost its way, can recover what has been lost.

In this chapter, though, Evans makes one of his most interesting historical points. He argues that the American revolution was essentially a conservative movement. The revolutionaries were trying to preserve the tradition that was lost in England. It is here again that Evans looks at the common law and notes how this common law tradi-

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<sup>22</sup> *Id.* at 75-94.

<sup>23</sup> *Id.* at 78.

<sup>24</sup> See SIR DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485*, at 294-95 (8th ed. 1966).

<sup>25</sup> Keir chronicles the incredible instability that took place in England for the 75 years before 1714. See *id.* at 289.

tion was a perfect foundation for free markets. In his view, the common law is a slow development of law over time that by its movement and indirection is essentially the same as the free market. Through the slow development of law, persons accede to changes which are made as needed to deal with the changing environment. The common law is the custom of the land: the most perfect law. It further inculcates spontaneous development of practices and institutions based upon the assent of many through the ages. The order of the common law, then, like the order of free markets, is such that it is designed from the bottom up and is therefore more perfect and ordered than if done in any other fashion.<sup>26</sup> Evans recognizes that the English did eventually lose this tradition. The demise of the tradition in England and the retention of it by the early Americans was due to the absolute values found in religion. It is religion that serves as the source of absolute values, and it is religion that ultimately created the specifically American experience.

Evans discusses how certain religious beliefs led to the development of the American experiment. One of the key beliefs of the Christian tradition is the notion of man's sinful nature. This "pessimistic" view of human nature is the subject of the chapter titled "If Men Were Angels."<sup>27</sup> While some claim that this pessimistic view of human nature leads to the demand of religious conservatives for an authoritarian government, Evans notes that conservatives imbibed with Burkean notions know that the sinfulness of the ruled also encompasses that of the rulers. Therefore, government needs to be fenced in with religion, custom, morality, and law. Certainly, if virtuous people govern, government is better. However, given the state of mankind, especially from a Puritan perspective, power was to be carefully controlled. The Puritan and American experience, unlike that of the French Revolution, did not view government by the people as perfect.<sup>28</sup> Instead, it recognized that the very nature of power is corrupting and that all power must be circumscribed by a variety of tools. This was one of the key worries of the Anti-Federalists as they argued against the exercise of power by the new federal government.<sup>29</sup> Cer-

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26 See EVANS, *supra* note 1, at 89-90.

27 *Id.* at 95-112.

28 See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 51-53 (heirloom ed. 1965) (1872). Burke notes that when, as is usually the case, the leaders became motivated by "sinister ambition," it led to the problems in France because of the composition of the government. *Id.* at 53.

29 The entire *Federalist Papers* is an argument about the power of the federal and state governments. Madison explicitly notes how the government was limited in its powers. THE FEDERALIST No. 39, at 240-46 (James Madison) (heirloom ed. 1966).

tainly, such a government was to be run by the same sort of persons who ran the state governments. Therefore, it could be argued that it was no more dangerous than were the state governments. However, the Anti-Federalists argued, and prevailed on this point, that the power of the federal government was so great that it needed to be controlled.<sup>30</sup>

The value of the American system was not that it created some sort of virtuous Greek state. Instead, it provided order within which people could go about their business. Although such a system of government could not prevent unvirtuous action, it could prevent unethical persons from wielding unlimited power over the citizens. In addition, the Founders clearly saw that such a government could only be established and thrive if the people were virtuous. If such virtues were lacking, it was not within the capabilities of the federal government, or any government, to create such virtue.

Although religious values seem well founded in this country and Evans thinks that the average American is a Christian, he believes that a new paganism is emerging in this country. One of the pervasive ideas throughout history has been materialism. Under this view of reality everything is determined by material wealth. Material conditions determine who will succeed and who will fail in life. All poverty, all crime, and all change can be explained in material terms. Consequently, every problem can be solved if enough material resources are used. Thus, we often hear the refrain: We can place a man on the moon, but we cannot eliminate poverty. It seems that if we can do the former, we must be able to do the latter.

Evans worries about this approach to reality. First, if we are essentially materialists, then the state may be tempted to use material resources—one of the few ways in which the state can really project power—to solve the problems created by material shortages. If we have poverty, create government programs to stamp out poverty. In addition, if material reality is all that exists, then there is no room for spiritual freedom. Consequently, materialism will become the all encompassing religion ruling society.

The American society of the twentieth century is closer to the pagans than it may think. For Evans, the green movement is essentially a pagan movement with mother earth as the new goddess. In addition, he notes that many of the most divisive moral issues facing

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30 See 1 THE COMPLETE ANTI-FEDERALIST 30 (Herbert J. Storing ed., 1981); see also THE FEDERALIST No. 84, at 510–20 (Alexander Hamilton) (heirloom ed. 1966). Although the Anti-Federalists prevailed, the federal government has taken on virtually unlimited powers.

this country today such as abortion and homosexuality, pit the neo-pagans against Christians. In such cases, the so called neo-pagans often cite the history of Greece and Rome as examples wherein abortion, homosexuality, and euthanasia were practiced.

These views are today often inculcated in students under the guise of the need for a non-judgmental society. Yet, Evans thinks that these positions are essentially religious in nature; that is, they are not subject to dispute but rely upon certain accepted first principles. These values can be and are taught in schools, yet the Bible is not because such education would violate the separation of church and state. Thus, neo-paganism is making serious inroads into modern life.

### *B. The Christian Medieval Tradition*

Given this background, Evans begins his historical argument in favor of the American experience and its aspirations by considering the course of human freedom. As he stated at the outset, the key issue that he wants to explain and defend is that of human freedom.<sup>31</sup> This, for Evans, is the key political issue. In considering the rise of such a notion, Evans notes that it is of relatively recent origin.

In the ancient world, to which we so often look, the notion of human freedom was lacking. In that world, the ruler had unlimited power, both temporal and spiritual. In addition, the world was full of bloodthirsty gods who ruled by will. Slavery and infanticide were the norm. Each human being was seen as part of the state and subservient to it.

The Christian era changed this world view. Under Christianity, nature is ordered by God, and the fact that each person is totally dependent upon God and will be judged on the last day makes each of them far more similar than different. Indeed, Christianity created a worldview never before seen.

Christians held that not only is every common person under the law, but so too is the king.<sup>32</sup> Moreover, it was not the role of the king to be the interpreter of the law. In the Christian world, the king was not only under the law, but the exercise of his power could be criticized by those who claimed to understand what his duty was under the

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31 A good contrast with Evans' approach can be found in ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993). George notes that the ancient tradition, which he defends, relies upon Aristotle who thought that the government should make men good. In fact, this is the "central purpose of any genuine political community." *Id.* at 22.

32 See EVANS, *supra* note 1, at 145. For an excellent discussion of this idea, see ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES* (1957).

law.<sup>33</sup> This placed a far greater degree of restriction on the king than had been common in the ancient world. Additionally, each person is equally a child of God with the king. It is understandable why in this world slavery was eventually eliminated, whereas it had only grown and flourished during the long history of both the Greek and Roman worlds.

This understanding of the relationship between persons led quite naturally to the world that was established in medieval christendom. Contrary to popular understanding, the medieval world was rich in freedom as understood by Evans. Grinding poverty may have existed. Yet, under medieval notions, the relationships between lords and vassals and the common people were full of obligations. These obligations were mutual insofar as the failure of one side to fulfill its duty resulted in the other side being freed of its mutual obligation. Evans gladly notes that the single most famous document limiting the power of the king arises in this age, the age of Magna Carta.

Strangely, we do not think of the Magna Carta as a medieval document. Indeed, it is not commonly referred to as such, and this reviewer has never seen it referred to as a typical medieval document. Yet Evans treats it as such. He claims that the "foremost political concept of the Middle Ages was constitutionalism."<sup>34</sup> The Magna Carta was a type of this age. It was a document created by Catholic clergy and feudal barons setting forth what the king could and could not do. The king, as a result of the Magna Carta, explicitly acknowledged that he must act pursuant to law and upon consent. This was a result never seen in the ancient world. For Evans, the Magna Carta shows the greatness of the medieval world that is so often misunderstood and nearly always referred to in a negative light.

The Magna Carta was created and thrived in a world where the social compact was well established. Locke did not create this view, but instead merely captured what was well understood at his time. Evans notes that the entire view of relationships in the medieval world was one where obligations were mutual. Of special importance in this era was the obligation involving taxes. The Magna Carta and the subsequent conflicts between Parliament and the crown emphasize that taxes were only to be given in exchange. No general power of taxation existed in such a world.<sup>35</sup>

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33 See KEIR, *supra* note 23, at 34-35.

34 EVANS, *supra* note 1, at 151.

35 See KEIR, *supra* note 23, at 10-16.

### C. *Pre-Founding America*

In his chapter entitled "The Dissidence of Dissent,"<sup>36</sup> Evans describes the America of the pre-revolutionary period. He notes how the settlers—large numbers of whom were Puritans—had created what Evans thinks was the best government. Having fled a country that had refused to recognize their freedom, these early settlers developed a theory of constitutionalism: "power wielded by consent, annual elections with an expansive franchise, . . . local autonomies and a Bill of Rights."<sup>37</sup> The Puritans were the persons most responsible for this development. Evans argues that their "covenantal theology" was critical to the formation of America as we know it.

Puritans maintained that the people were to choose their leaders. Consequently, they had a strong view of the role each individual would play in the church and in the polity. Evans states that twenty thousand Puritans fled England to America between 1629 and 1640.<sup>38</sup> This is astonishing. The people who came were usually led by educated ministers. In virtually every instance, these people formed the social contract of which Locke would later write. These contracts allowed voting on a scale unseen in any known history.

The Puritans had a long time to graft onto America. We often forget that approximately one hundred and fifty years separate the founding of the American colonies and the Revolutionary War. During this time the colonists, Evans argues, were actually more traditional than the English themselves. Moreover, the revolution was itself a well ordered conservative movement. In support of this thesis, Evans notes that the soldiers who had fired on the civilians in the so called "Boston Massacre" were either found not guilty (six) or let off with light sentences (two) by the supposedly outraged colonists.<sup>39</sup> This occurred shortly before the war. Certainly such an outcome contrasts sharply with the untold carnage that accompanied the French Revolution.

The long time frame during which the colonists grafted themselves onto the North American land gave the colonists certain expectations. One of the long standing traditions in the colonies was that of self-taxation. This tradition had never been challenged until shortly before the Revolutionary War. The British, in part hungry to pay war debts, but even hungrier to assert their power, began to hold that Parliament could do what it willed, including taxing the colonists. This

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36 EVANS, *supra* note 1, at 185–203.

37 *Id.* at 201.

38 *See id.* at 191.

39 *See id.* at 205.



attempt to exercise unlimited power, rather than the taxes themselves, inevitably led to the war. It was the Americans who, in accord with hundreds of years of English tradition, held that they could not be taxed by a Parliament which did not represent them.

The Declaration of Independence was a logical outgrowth of the situation in which the colonists found themselves. This document is of the same genre as the Magna Carta. The colonists spent two-thirds of the document reciting the abuses committed by George III. The most famous passage of the Declaration, "we hold these truths," was based upon the principles that had undergirded the colonists since they set foot on American shores: that God has created men equal, and that government is based upon consent. The importance of God in that document cannot fairly be ignored. These were clearly a religious people.

Having seized their independence, the Americans now had to fashion a new government. The genius of the Constitution was two-fold. First, it was a written document, thereby meant to provide a source of stability and clarity that would otherwise be lacking. Second, it depended upon two types of checks—those between the various branches of government and those between the states and the federal government.<sup>40</sup> It was impossible for the Founders to foresee what would transpire with regard to this document during the ensuing two hundred years.

### III. MODERN PROBLEMS

Having shown the extent to which the American enterprise was built on historical and actual notions of limited government, Evans concludes his book by looking at where we are today. He takes up two issues, religion and economics, and shows how the modern world has so thoroughly destroyed the notions that were developed for hundreds of years and clearly established in the Constitution.<sup>41</sup>

First, Evans looks at the "establishment of religion" problem in America. He notes that in 1775, no fewer than nine colonies had established religions.<sup>42</sup> South Carolina's 1787 constitution stated that the Christian Protestant religion shall be deemed the established religion of the state.<sup>43</sup> Despite these historical facts, the Supreme Court has incorporated the establishment clause vis-a-vis the states so that establishment problems face all governmental bodies. Clearly, Evans

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40 *Id.* at 261–64.

41 *Id.* at 270, 289.

42 *Id.* at 275.

43 *Id.* at 276.

is correct that the Supreme Court had to stretch to do so. However, he does not set forth what can be done now. What can or would happen if the states were allowed to establish religion as they wanted? Given the tremendous power of the purse exercised by government, the role of the state in squelching or influencing religion is far more expansive than could ever had been imagined in 1787. What can be done?

Similarly, Evans critiques the loss of economic liberty in the United States. Economic liberty is essential for a free society, and in Evans' view, it is recommended by religious precepts.<sup>44</sup> Economic freedom is indeed the single most common way in which the citizen expresses himself or herself. It is as worker, not as writer, that most individuals in a society express themselves. Yet, the liberty of the press is given far more extensive protection than that of economic liberty.

#### IV. CONCLUSION

Although Evans extensively critiques the state of affairs in which Americans find themselves, he provides few easy solutions in *The Theme Is Freedom*, when he provides any solutions at all. Evans argues that the problem America faces is religious.<sup>45</sup> Until a recovery of religious faith occurs, freedom cannot be created.<sup>46</sup> In addition, Evans argues that we need to curb federal power and develop a rule of law.<sup>47</sup> In this regard, Evans makes a most telling point about the state of affairs in America—today the key issue in politics is not on the limits of power but on who will wield that power.<sup>48</sup> Unless and until that view of power, and the demise of religion, is changed, the theme may be freedom, but its development into a full story will be unfulfilled.

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44 *Id.* at 290.

45 *Id.* at 323.

46 See also ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 336–39 (1996). Bork sees a robust religious community as one of the key antidotes to the current decline in American life. *Id.* at 336.

47 EVANS, *supra* note 1, at 323.

48 *Id.*

